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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. HOWARD SCHREIBER, Defendant and Appellant.	H034327 (Santa Clara County Super. Ct. No. BB411930)

Defendant Howard Schreiber was convicted in absentia by a jury of one count of first degree burglary (Pen. Code, §§ 459, 460, subd. (a))[1] and one count of vandalism (§ 594, subds. (a), (b)(1)). Schreiber was sentenced to a total term of six years.

On appeal, Schreiber first contends that his trial in absentia violated his constitutional and statutory rights, as he did not expressly or impliedly waive his right to be present during trial. Second, he argues that he is entitled to a new trial as there was a conflict and a breakdown in communication between himself and his appointed lawyer. Third, Schreiber claims that, because of this conflict and breakdown in communication, the trial court's denial of his request for a continuance to retain private counsel was reversible error and that the trial court evaluated that request under the incorrect standard. Finally, Schreiber claims that his appointed counsel was ineffective.

We disagree with each of these contentions and shall affirm.

[1] Further statutory references are to the Penal Code.

I. FACTUAL AND PROCEDURAL BACKGROUND

As the facts of the underlying crime are not particularly relevant to the issues raised on appeal, we need not relate them in any detail. In August 2003, responding to a residential burglar alarm, Palo Alto police discovered that someone had broken down the front door, broken a window on a rear door and taken certain items from packages left on the residence's front porch by a deliveryperson. There were three spots of blood on the frame of the broken door from which DNA was extracted and a DNA profile was created. The DNA collected at the scene was reported to match that of Schreiber, who was in custody in Sacramento County on burglary and sexual assault charges. Palo Alto Police Officer Kara Salazar obtained a search warrant to collect Schreiber's blood and buccal swab samples. The DNA profile generated by these samples matched the DNA profile for the samples collected at the scene of the Palo Alto burglary.

A. The trial

On April 20, 2009, the trial court called the matter, noting that the case had been in trial posture for two years. Defense counsel requested a continuance in order to further review the DNA evidence with his expert, both to go over the statistical analysis used by the crime lab as well as to review the involvement of a criminalist from Sacramento County[2] who had purportedly provided "faulty information" to the national DNA database. Since that criminalist had provided the information that led to the DNA match between the Sacramento case and the instant case, which led Salazar to obtain a search warrant for Schreiber's blood and saliva samples, defense counsel wanted to discuss the matter further with his expert and possibly bring a motion to suppress.

[2] According to defense counsel, the criminalist, Mark Eastman, had been fired from his employment with the Sacramento County crime lab after it was discovered that he had entered a number of false DNA profiles into the national DNA database.

The prosecutor opposed the request for a continuance, noting that the necessary information regarding the statistical analysis had been provided to defense counsel months ago. In addition, the defense was not planning on calling its DNA expert to testify, but simply wanted time to consult, and defense counsel should have ample time to do that while the prosecution was presenting its case in chief. With respect to Eastman, the prosecutor argued that there had been no showing that anything inappropriate Eastman may have done would impact this particular case, and in any event, Salazar relied on the information in good faith in obtaining the search warrant. The DNA match would have been discovered inevitably following Schreiber's conviction in Sacramento County and his DNA profile would have been entered into the national database at that point. Furthermore, Schreiber's DNA was already in that database both from a burglary case in Illinois and a rape case from New York.

The trial court concluded that the defense had not established good cause for a continuance, since counsel had the necessary evidence and could consult with his expert as trial proceeded. In addition, the issues regarding Eastman and the DNA evidence were discussed extensively at the preliminary hearing in April of 2007, yet no motion to suppress was ever filed, not even by Schreiber's former private counsel who had worked on the case for a year. The court also noted that "witness convenience would be much impinged" by a continuance. Even if such a motion to suppress were filed, the court indicated it would likely be denied either because of good faith reliance by the police or because the information would have inevitably been discovered.

The court then briefed counsel on the jury selection process, and suggested that they retire to chambers for further discussions. At that point, defense counsel notified the court that Schreiber would like to retain private counsel, saying "[h]e doesn't believe I can represent him so he wants me to tell the court." Schreiber interjected, "You're too busy with other stuff." When the court asked if he had other counsel who would represent him, Schreiber said "I must have got in touch with 25 attorneys. They're all

chicken. That goes for all my cases." Defense counsel suggested that a *Marsden*[3] hearing might be appropriate. Schreiber continued to address the court, "I like the guy [i.e., defense counsel]. He is doing his job. I think if I get a paid attorney you'll understand a little more about the case because he's not giving you the full details about this Eastman, the 15 months it took for the--and meanwhile I am--and the bar code was between '97 and 2003 to all the cases, and I got proof of all the documents. I got it on paper I got everything. And I got also cases that are pending." Schreiber was advised by his counsel and the court to remain silent, but he continued to talk about his case. The court then indicated that it was required to hold a *Marsden* hearing. Before taking a recess, the court noted that a jury panel had been called and that the "court has committed its time to completing its case."

1. The Marsden *hearing*

At the *Marsden* hearing, the court asked Schreiber, "What I understand from what you said was that you wish a continuance so that you may hire a private counsel to replace Mr. Lopez. Do I have it right?" Schreiber responded, "It is coming down to it. If it comes down to it, that is 100 percent." When asked to explain his request further, Schreiber began to talk about national databases, laboratory documents and a "conspiracy" against him involving "[d]etectives, police, whatever, from my past and this all started back east even before any part of California." [*Sic*.] Schreiber began talking about the Sacramento case, questioning the credibility of the victim and the conduct of his trial.

The court asked him about his former retained counsel, and Schreiber complained that "[h]e took my family's money and left" and that he was "not presenting all my stuff." Schreiber then began discussing the strength, or lack thereof, of DNA evidence in general, saying "Forensic workers they tend to get drunk. They sleep. They sleep on

[3] *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*).

their work. They don't clean things properly. They don't change their gloves, the tubes. They drink a lot of coffee. It makes them crazy. I read articles people that work late in offices and they drink a lot of coffee makes them too wild. Their mind wanders on. Things happen. [¶] They might not think they're doing mistakes, but it's considered a drug. Caffeine, the caffeine make you go wild, and you do quicker things. Slow--slows the mind up so can you stay up for your 15 hour work overtime at the laboratory when you're analyzing hundreds of people from serious crimes." [*Sic.*]

The court attempted to direct Schreiber back to a discussion of his representation, saying that Schreiber had said he had talked to many attorneys and none would take his case. Schreiber said "Right now I am looking for attorney [*sic*] either San Jose or San Francisco, and I should have one mostly any minute." When the court asked who that attorney would be, Schreiber replied, "Various names." He added that he had no money and that his family would have to pay for private counsel, however. Schreiber indicated that he told his family they could rehire his former private attorney "if he wants to resume it, . . . but if he don't do it the way I said, . . . I'm going to go with a new straight up person that we're going to be client and attorney, and we're going to be, you know, reasonable with each other on all these matters."

Schreiber then indicated that the prosecution had made plea offers in the current case, and that the case only involved a broken door. He emphasized, "Nobody is home. Nobody got hurt. . . . Nobody else damaged around. Nobody knew me. Nobody was being threatened."

The court asked defense counsel to articulate "anything else" the court should be aware of in relation to Schreiber's request. Defense counsel said, "I think he is concerned that I am not going to present information in regards to everything he talked about Illinois, 1996, bar codes. I have explained to him I did speak to my expert, and my expert said they're going to use the crime scene DNA and the reference samples DNA's [*sic*] that were gathered via the search warrant, and there is not a lot there. [¶] My

consultant basically said it is a strong DNA reference sample from the crime scene. Of course, it is [a] strong reference sample from my client gathered via the search warrant. There really is not a lot there to argue strongly about anyway. Basically I think he is uncomfortable with me not presenting all the history that possibly dates back to 1996 with bar code [*sic*] and his concern about the possible conspiracy of changing of the bar codes." Schreiber added, "Plus he is very busy. I will tell him even before this, he still has to type up a lot of motions to suppress of [*sic*] my incidents. Even if it has to all come out, it has to be brought out by different states, data banks, and people that--employees that work behind it." Schreiber continued to talk about other cases the Sacramento County criminalist, Eastman, "messed up on" and how Schreiber has "documents that he is involved in every correspondence to every lab and analysis that is responsible with my name and his name."

The court asked defense counsel if he had contacted or been contacted by any private counsel regarding taking over Schreiber's case. Counsel responded, "Just [Schreiber's former private counsel] but he informed me he wasn't taking over the case." The court inquired if defense counsel was "adequately prepared to meet the actual evidence in this case as opposed to the evidence that was in some other cases in other [counties]?" Defense counsel said, "On this particular case the burglary itself it is a very simple straightforward case as far as the case is concerned. As I indicated earlier, I requested a continuance because I believe it was necessary for [p]reparation for a potential suppress motion, but the case itself, factually it is really addressing two witnesses who are the residents of the place that was broken into and the DNA experts." He also acknowledged being prepared to address the legal issues about the elements of the charged crimes.

The court denied the motion, stating "[t]here [are] no[t] really any *Marsden* issues here or being argued. It is just a matter of requesting a continuance to substitute in private counsel. [¶] Court has not heard good cause for such a continuance articulated.

There is no specific plan. There is no specific lawyer. Certainly there is no lawyer that says he is ready to go to trial in a timely fashion. Counsel is prepared."

2. Schreiber's refusal to participate

Following a lunch recess, the court indicated that the jury panel had checked in and was ready to be brought into the courtroom for selection. The prosecutor asked to resolve an evidentiary issue relating to the victim from the Sacramento County case testifying in the current proceedings. When the court asked defense counsel if he had been able to discuss a proposed stipulation on that subject with Schreiber, defense counsel said, "Mr. Schreiber indicates he doesn't wish to [be] present or doesn't want to go through the trial right now. He wants to hire private counsel. He says he will address the court with a couple [*sic*] sentences and leave the court."

Schreiber said, "I want to tell you right now, you just took over the case. Judge Pichon knows the case for 25 months. She waived me of being here. She waived hearings, trials, different attorneys representing matters and all these other people taking his place when she is in trial. Nothing got done. No motions. Nothing was even addressed for the DA, the attorney, me and you to go over and say you know we got something here that don't waste nobody's time. [¶] We're not bitching like a man and woman story here today. This is uncalled for. You people are educated adults. You know everything. There is no reason for me to have to argue with you. If I knew this was coming I possibly would have taken the two misdemeanors and said--and get up out of here when I had shorts. [¶] All right. So my point is right now this case should be sent to Judge Pichon who knows the case and she will understand when she wants to put the case on trial." [*Sic.*] Schreiber stated that he would not accept the jury, and reiterated that the case should be returned to Judge Pichon.

The court asked, "Are you telling me you're going to refuse to participate in the trial and you are going to--" and Schreiber interrupted, "I am not going to participate in any criminal matter. I am just telling you I want the case taken to [Judge] Pichon, and let

me hire a lawyer and we proceed for one last time with that person." The court began to speak, but Schreiber interrupted again. Finally, the court stated, "Let me respond if I can. To make sure we're on the same page. All I have said so far is we had a motion for a continuance. First your attorney made a motion for continuance, and I went through the different factors I am required to consider before making such a decision, and I found the factors did not favor the motion for continuance so I denied his motion for continuance. [¶] Then you made a motion for continuance to hire [a] private attorney, but as far as I know there is no private attorney in the world who is going to represent you, and all the ones you tried have said no. [¶] . . . [¶] You know it is just speculative."

Schreiber said that other attorneys were likely put off by his other cases in Sacramento and the East Coast, and were fearful of "get[ting] a bad name." The court repeated, "So far all I have decided, I respectfully denied your request for continuance to hire private counsel and observed that it was not timely." At that point, Schreiber insisted, "[y]ou did but you can't do that because a defendant has a right not to go to trial or go to trial or take an offer, you know, just wait." He claimed more evidence needed to be collected and that he needed his own forensic expert to review the case.

The court responded, "Let's get to the bottom line, Mr. Schreiber. The transportation staff, the bailiffs informed me you said you would refuse to cooperate, refuse to go to trial. You felt you had an absolute veto power over the court taking the case to trial and so that is fine. You and I disagree on the legality of your power." Schreiber again said, "I am not accepting the 14 jurors. That's got to be on record."

The court advised Schreiber that he had the right to be present at trial to assist in selecting a jury and to confront the witnesses. Schreiber said, "I don't need to see nobody. [¶] . . . [¶] . . . I am not picking the jury, accepting it. I don't want to do the trial yet. I want to get down to more forensic information and all the people involved." He repeated his concerns that a jury does not understand that forensic science in practice is different than the forensic science they see on television programs, such as "CSI."

"There's a lot of screw ups, mess ups, employees not certified, lose their licenses [over] alcoholic arrest."

After a continued argument over the court's ruling on his motion for continuance, the following exchange occurred:

"THE COURT: What I am trying to figure out is, are you saying you will not participate in the trial, that you do not want to be present with the jury?

"[SCHREIBER]: No. I will not do the trial until I am ready with forensic and another attorney.

"THE COURT: I already ruled on that. You don't have veto power whether we go to trial.

"[SCHREIBER]: I won't repeat myself. It is not a broken record.

"THE COURT: I am trying to get a clear statement whether you're going to remain here when we bring the jury in. [¶] . . . [¶]

"[SCHREIBER]: I won't be here. I want my attorney and forensic person to review and explain to me everything from Illinois to here.

"THE COURT: I understand now what you intend to do and that is fine. [¶] . . . [¶] You have a right to be here."

When the prosecutor asked to return to the evidentiary issue that the court had started to address, Schreiber said, "If you're going to start anything I am going to tell you also to take me downstairs. That's it. [¶] . . . [¶] I wish to leave. I will hire my own attorney." The prosecutor acknowledged that Schreiber had a right to not participate, but asked that, "as long as he is here, let's keep him here and get started with the trial."

The court responded, "I won't keep him against his will if he willfully absents himself. He has that choice. He can't veto my decisions and do a lot of things, but he can decide not to participate. One issue however and there's a complex and potentially prejudicial issue with respect to using the testimony of [the Sacramento victim]." The prosecution wanted to introduce the evidence under Evidence Code section 1101,

subdivision (b), to prove intent. In the Sacramento case, Schreiber had been charged with burglary, robbery, attempted rape and felony sexual battery, though he was ultimately not convicted on the sex charges. The evidence was potentially prejudicial, since the Sacramento victim alleged that Schreiber pushed her onto the bed, kissed her and felt her breasts. He unzipped his pants and tried to spread her legs, but when she resisted, he masturbated and ejaculated on her. The court suggested that the parties stipulate that whoever committed the burglary in Palo Alto had the intent to commit a theft, which would avoid the need to introduce the evidence from the Sacramento case for that purpose. The court asked if defense counsel and Schreiber had made a decision about accepting that stipulation, and defense counsel replied, "Your Honor, I don't have a response to the court's question. I can't say yes." Schreiber interjected, "There is no reason for him to represent me at this moment."

The prosecutor began to argue why the court should admit the proposed Evidence Code section 1101, subdivision (b) evidence when Schreiber said, "I am out of here. You're starting the case." The court reminded him that he was welcome to return if he changed his mind, but that "if you decide to willfully absent yourself, I will go on with the trial." Schreiber said, "Do the trial. But don't mention my name and my numbers. Pretend--do the trial and see what the juries--I tell you what. I got something good for you. You want to figure out how the case is going to go? Do the trial as you know a freebie. . . . [¶] . . . [¶] Do the trial as a freebie. That's what you want. But in my eyes I think it should go to Judge Pichon with my new attorney. [¶] . . . [¶] I will see you next week with an attorney maybe. Like I said, I had no choice." Schreiber then left the courtroom.

The court then said, "I guess this is what we expected after we got the news from the bailiffs at lunchtime. [¶] Mr. Schreiber stated he was not going to participate in the trial. I will find he has fully absented himself and that he understands his constitutional right to be present and to participate in his defense, and we'll proceed in his absence. [¶]

The court will, of course, admonish the jury at the appropriate time not to draw any adverse inferences from his absence."

The court proceeded to hear and rule on the evidentiary issue, finding that the prosecution could present evidence from the Sacramento case and the parties agreed that it could be presented in a sanitized manner without any reference to the sexual assault. Following a recess, the jury pool was voir dired and a panel selected.

The next day, April 21, 2009, the court asked defense counsel to speak with Schreiber each morning and afternoon to determine if he had changed his mind about attending the trial. Counsel said he had spoken to Schreiber and that he "does not wish to participate in this trial." Again on the mornings of April 22 and April 23, 2009, the court confirmed that Schreiber continued to refuse to appear for his trial. On the morning of April 24, 2009, the court noted Schreiber's voluntary absence, but also discussed the procedure to follow when the jury reached a verdict in the case. The court said, "[I]f we get to a verdict and he does not wish to rejoin us for that, I am not going to force him in chains and with deputies dragging him. . . . I do believe he would resist any such attempt." Defense counsel reported that Schreiber told him that morning to stop asking him to participate. Though it had not been put on the record, defense counsel reported that, the day before, Schreiber told him: "[L]eave me alone. I just want to have a sandwich and a movie down here in the holding cell."

C. The verdict and sentence

The jury found Schreiber guilty as charged and he was subsequently sentenced to a total term of six years in prison.

II. DISCUSSION

A. Schreiber's constitutional rights were not violated by his trial in absentia

Schreiber argues that his trial in absentia violated his federal constitutional rights, as well as his state constitutional and statutory rights, to confront the witnesses against him and to be present during critical stages of the proceedings against him. He was never

asked to execute a written waiver of his right to be present, as required by section 977, subdivision (c), and therefore, his conviction must be overturned.

A criminal defendant's right to be present at trial is protected under both the federal and state Constitutions. (U.S. Const., 6th & 14th Amends.; *United States v. Gagnon* (1985) 470 U.S. 522, 526; Cal. Const., art. I, § 15; *People v. Waidla* (2000) 22 Cal.4th 690, 741.) Although the constitutional right is rooted to a large extent in the Confrontation Clause of the Sixth Amendment, this right is also protected by the Due Process Clause in some situations where the defendant is not actually confronting witnesses or evidence against him. (*United States v. Gagnon, supra*, at p. 526.) Our state Constitution guarantees that "[t]he defendant in a criminal cause has the right . . . to be personally present with counsel, and to be confronted with the witnesses against the defendant." (Cal. Const., art. I, § 15.)

California's constitutional protection is implemented by sections 977 and 1043. (*People v. Gutierrez* (2003) 29 Cal.4th 1196, 1202 (*Gutierrez*).) Section 977, subdivision (b)(1)[4] requires a defendant to be present for five fundamental proceedings--the arraignment, the taking of a plea, the preliminary hearing, the presentation of evidence before the trier of fact, and the imposition of sentence--and entitles the defendant to be present for the remaining proceedings. (*Gutierrez, supra*, at p. 1203.) Section 1043, subdivision (a) provides that a defendant in a felony case shall be personally present at trial except as otherwise provided in that section.

[4] Section 977, subdivision (b)(1), provides, in pertinent part: "In all cases in which a felony is charged, the accused shall be present at the arraignment, at the time of plea, during the preliminary hearing, during those portions of the trial when evidence is taken before the trier of fact, and at the time of the imposition of sentence. The accused shall be personally present at all other proceedings unless he or she shall, with leave of court, execute in open court, a written waiver of his or her right to be personally present, as provided by paragraph (2)."

"A defendant's right to presence, however, is not absolute." (*Gutierrez, supra,* 29 Cal.4th at p. 1202.) A defendant may waive his presence at certain proceedings upon execution of a written waiver. (§ 977, subd. (b)(1) & (2);[5] *People v. Ruiz* (2001) 92 Cal.App.4th 162, 165, fn. 3 ["Under both federal and state constitutional law, a defendant may validly waive presence at critical stages of the trial," citing *People v. Price* (1991) 1 Cal.4th 324, 405].) Moreover, a defendant's absence "in a felony case after the trial has commenced in his presence shall not prevent continuing the trial to, and including, the return of the verdict in any of the following cases: [¶] . . . [¶] (2) Any prosecution for an offense which is not punishable by death in which the defendant is voluntarily absent." (§ 1043, subd. (b).) Under section 1043, subdivision (b)(2), a custodial defendant may orally waive his right to presence. (See *Gutierrez, supra,* at p. 1206.) Furthermore, the presence requirement in section 977, subdivision (b)(1) "does not preclude a defendant from being 'voluntarily absent' during the taking of evidence under section 1043, subdivision (b)(2)." (*Gutierrez, supra,* at p. 1203.) Once "a trial has commenced in a defendant's presence, section 1043 applies." (*Ibid.*; see also *id.* at p. 1204 [if a defendant "was present when the trial began, section 1043, subdivision (b)(2) governs, notwithstanding section 977, subdivision (b)(1)'s presence requirement"].)

The question then becomes: When does a trial "commence" for purposes of section 1043? In *People v. Molina* (1976) 55 Cal.App.3d 173 (*Molina*), it was held that trial commences no earlier than when jury voir dire begins. According to the *Molina* court, trial commences as provided in Evidence Code section 12, subdivision (b)(1) and when jeopardy attaches. Under Evidence Code section 12, subdivision (b)(1), "A trial is commenced when the first witness is sworn or the first exhibit is admitted into evidence

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[5] Section 977, subdivision (b)(2) provides: "The accused may execute a written waiver of his or her right to be personally present, approved by his or her counsel, and the waiver shall be filed with the court. However, the court may specifically direct the defendant to be personally present at any particular proceeding or portion thereof."

and is terminated when the issue upon which such evidence is received is submitted to the trier of fact." Jeopardy attaches when the "jury is duly impanelled [*sic*] and sworn to try the cause." (*Molina, supra,* at p. 177.) Because the defendant in *Molina* absented himself from trial just before the twelfth juror was selected, "his absence occurred before the trial commenced" and the judgment against him was reversed. (*Ibid*.)

The rule in *Molina* seems untenable. It, in essence, gives a criminal defendant an absolute veto over the scheduling of his trial. If, as here, a defendant seeks to further delay the trial and the trial court denies a request for a continuance, he or she simply refuses to attend the proceedings before the jury is sworn. At that point, the court and prosecutor will know that any resulting conviction would be reversed so why would they reasonably expend their limited time and resources, let alone impose on the witnesses, court staff and a jury panel, by continuing with the trial? Obviously, when drafting section 1043, the Legislature could not have intended such a result, especially under circumstances such as these, where it is apparent that Schreiber was well aware of the imminent trial and his right to attend. It is telling that, in the 35 years since it was decided, no published case has followed *Molina.*

We think the better rule is this: A trial "commences" for purposes of section 1043 if "the defendant is physically present in the courtroom where the trial is to be held, understands that the proceedings against him are underway, confronts the judge and voluntarily says he does not desire to participate any further in those proceedings." (*People v. Lewis* (1983) 144 Cal.App.3d 267, 279 (*Lewis*); *People v. Ruiz, supra,* 92 Cal.App.4th at pp. 166-167, 169 [applying the *Lewis* test to find that trial commenced under section 1043, subdivision (b)(2) for a defendant who absented himself before jury selection].) The *Lewis* court expressly rejected the holding in *Molina* on the ground that the policy goals underlying section 1043--(1) insuring that a defendant, personally present in court, has "voluntarily and knowingly waived his right to be present for his trial" and (2) to avoid a defendant's claims that he was absent from trial "because he

could not find the courtroom or thought the trial started on a different day" or some similar excuse--are different than the policy goals underlying Evidence Code section 12, subdivision (b)(1) or the attachment of jeopardy. (*Lewis*, *supra*, at p. 278.) We agree with that reasoning.

Here, Schreiber was physically present in the courtroom where his trial was to be held. Schreiber understood that the proceedings against him were underway, he confronted the judge and voluntarily stated, multiple times, that he did not desire to be present for the proceedings. Contrary to his argument on appeal, the record demonstrates that Schreiber was fully aware of his right to be present at trial and that he voluntarily waived that right. Accordingly, under *Lewis*, *supra*, 144 Cal.App.3d at pages 278-279, Schreiber's trial had "commenced" in his presence within the meaning of section 1043, subdivision (b)(2); he voluntarily waived his presence at trial; and the trial court did not violate his state or federal constitutional rights or state statutory rights in proceeding with the trial in defendant's absence.

We further reject Schreiber's argument that the trial court's failure to obtain a written waiver from him somehow invalidates his convictions. The California Supreme Court has noted that a trial may continue in the absence of a custodial defendant, who was present when the trial commenced, if the evidence shows that the defendant's absence is voluntary. (*Gutierrez*, *supra*, 29 Cal.4th at p. 1206.) Schreiber's claim that he could not have knowingly and intelligently[6] waived his right to be present because he felt

[6] Waivers of constitutional rights must be "knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." (*Brady v. United States* (1970) 397 U.S. 742, 748 (*Brady*).) However, Schreiber misapprehends the United States Supreme Court's use of the term "intelligent" in this context. It cannot be read to require that the decision to waive a constitutional right must be somehow wise or astute in order to be valid. Instead, the meaning to be ascribed to the word is made clear by the remainder of the sentence, i.e., "acts done with sufficient awareness of the relevant circumstances and likely consequences." (*Ibid*.) Reading the phrase as a whole, it is (continued)

that he had no choice but to leave and "[h]e did not believe the court could legitimately go forward without him," rings false. The record is clear that Schreiber was advised by the court, several times, that he had a right to be present, that he could not overrule the court's decisions, that he had not shown good cause to continue the proceedings and that the trial would go on, with or without his presence. Despite those admonitions, Schreiber persisted that he would not accept a jury or participate in any way. We find, as did the trial court, that Schreiber understood his right to be present and participate in his defense, but willingly chose to absent himself. It may not have been a wise decision on his part, but it was certainly a decision made with knowledge and "with sufficient awareness of the relevant circumstances and likely consequences." (*Brady*, *supra*, 397 U.S. at p. 748.)

B. Schreiber's Marsden *motion was properly denied*

Schreiber contends that the trial court should have granted his *Marsden* motion and allowed him to retain counsel because there was an irreconcilable conflict and breakdown of communication between himself and appointed counsel.

To protect and ensure a defendant's constitutional right to effective assistance of counsel, a court must replace appointed counsel with new counsel where "the defendant made 'a substantial showing that failure to order substitution is likely to result in constitutionally inadequate representation' [citation], or stated slightly differently, 'if the record shows that the first appointed attorney is not providing adequate representation or that the defendant and the attorney have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result.' " (*People v. Hines* (1997) 15 Cal.4th 997, 1025.)

Although a *Marsden* hearing is informal, a court must "ascertain[] the nature of the defendant's allegations regarding the defects in counsel's representation and decide[]

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obvious that the word "intelligent," at least in this context, simply connotes awareness or consciousness.

whether the allegations have sufficient substance to warrant counsel's replacement." (*People v. Hines*, *supra*, 15 Cal.4th at p. 1025.) To this end, the court must allow the defendant to explain the specific reasons for seeking new counsel and relate specific examples of allegedly ineffective representation. (*Id*. at p. 1024; *People v. Webster* (1991) 54 Cal.3d 411, 435; *Marsden*, *supra*, 2 Cal.3d at pp. 123-124.) "Depending on the nature of the grievances related by defendant, it may be necessary for the court also to question his attorney." (*People v. Turner* (1992) 7 Cal.App.4th 1214, 1219.)

On appeal, "[w]e review a trial court's decision declining to relieve appointed counsel under the deferential abuse of discretion standard." (*People v. Jones* (2003) 29 Cal.4th 1229, 1245.) Pursuant to that standard of review, we find no error.

At the outset of his *Marsden* hearing, Schreiber discussed at length a number of issues, including his other criminal cases, his belief that there was some sort of conspiracy against him apparently involving police in Illinois, New York and California, the credibility of the Sacramento victim, the subpar performance of his former retained counsel, the incompetence of forensic workers in general and the deleterious effects of caffeine on one's job performance. When asked if he had private counsel standing ready to take over his case, Schreiber admitted that he did not, nor did he have the funds to pay private counsel, saying that his family would have to pay. Even after Schreiber said he "should have [an attorney] mostly any minute," he could not provide the court with a specific name. In commenting on the instant case, Schreiber said only that plea offers had been made and that he did not think it was serious because no one was home and no one was injured.

When the court asked defense counsel if he could elaborate on Schreiber's concerns, defense counsel reiterated that Schreiber wanted him to present evidence regarding his prior cases and the evidence used against him in those cases. Defense counsel said he had explained to Schreiber that the prosecution was going to use the DNA evidence collected at the scene of the Palo Alto burglary and the DNA sample

collected from Schreiber at the Sacramento County jail, so "[t]here really is not a lot there to argue strongly about anyway." He believed Schreiber "is uncomfortable with me not presenting all the history that possibly dates back to 1996 with bar code[7] [*sic*] and his concern about the possible conspiracy of changing of the bar codes." Schreiber interjected that defense counsel was "very busy," and again began to talk about his prior cases and the Sacramento County criminalist, Eastman.

The record does not reflect any breakdown in communication or any irreconcilable conflict between Schreiber and his appointed counsel. In fact, what the record shows is that Schreiber's *Marsden* motion was essentially a motion for a continuance for him to retain and substitute private counsel. However, Schreiber was unable to show good cause to grant his request because he had no specific plan, nor did he have a specific lawyer who could step in and represent him. Defense counsel was prepared to try the case, and the trial court did not abuse its discretion in denying the *Marsden* motion.

C. Schreiber's motion for a continuance to retain counsel was properly denied

Schreiber contends that the court's denial of his request for a continuance to hire a private attorney violated his right to counsel of his choice. He further argues that the court applied the wrong standard in evaluating his request.

The most glaring problem with Schreiber's argument on this subject is that it focuses on the right of a nonindigent defendant to retain counsel of choice. Schreiber was not seeking to discharge retained counsel; he was seeking to discharge his appointed counsel and substitute retained counsel in his place. However, Schreiber admitted that he had no money to pay an attorney, though he suggested his family might. He further

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[7] Schreiber was the first person to use the phrase "bar code" on the record during the *Marsden* hearing, saying "It all started back in Albany, New York where I got that bar code and that profile." Schreiber is presumably talking about his DNA profile and perhaps likening it to a barcode, such as that used on packaging, but the exact meaning of the phrase is never explained.

admitted that he did not have "somebody standing in the wings" to take his case, that he had "got in touch with 25 attorneys," none of whom would represent him.

The law is clear that a defendant may discharge appointed counsel only where that attorney is not adequately representing the accused or the two have become embroiled in an irreconcilable conflict. (*People v. Hines*, *supra*, 15 Cal.4th at pp. 1025-1026.) As we discussed in the preceding section, Schreiber failed to demonstrate that either of those circumstances existed in his case. The record shows that Schreiber was dissatisfied with his appointed counsel's tactical decision not to present evidence from his other cases or argue his conspiracy theory to the jury. His disagreement with appointed counsel's planned trial strategy does not mean that he was receiving inadequate representation. Schreiber had no right to discharge appointed counsel, who was providing adequate representation, on the day of trial and substitute conjectural[8] retained counsel. The court applied the proper standard and did not abuse its discretion in denying Schreiber's request.

D. Schreiber's counsel was not constitutionally ineffective

Schreiber's final argument is that his appointed counsel provided ineffective assistance by failing to accept a stipulation that would have excluded prejudicial evidence from the Sacramento case and by failing to conduct adequate investigation.

To prevail on a claim of ineffective assistance of counsel, the defendant "must establish not only deficient performance, i.e., representation below an objective standard of reasonableness, but also resultant prejudice." (*People v. Bolin* (1998) 18 Cal.4th 297, 333.) "[P]rejudice must be affirmatively proved; the record must demonstrate 'a reasonable probability that, but for counsel's unprofessional errors, the result of the

[8] Since Schreiber admitted that 25 attorneys had already declined to take his case, it is not inconceivable that he would eventually end up either attempting to represent himself or once again availing himself of appointed counsel.

proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' " (*Ibid.*, quoting *Strickland v. Washington* (1984) 466 U.S. 668, 694.)

The record again does not support Schreiber's claims. Defense counsel did not fail to accept a stipulation on the proffered evidence from Schreiber's Sacramento case, instead it is clear that Schreiber refused to give that stipulation or cooperate in any way because he was intent on absenting himself from the trial. Defense counsel, though acknowledging his belief that such a stipulation was in his client's best interests, felt he was not empowered to waive his client's right to proof of each and every element of the charged offenses. Regardless, even though the evidence came in, the most prejudicial aspects of it were sanitized. The Sacramento victim testified about the burglary, but did not discuss the sexual nature of the assault, such as how Schreiber masturbated and ejaculated on her after she frustrated his attempt to rape her. Her testimony was admissible to prove the element of intent to commit burglary in the Palo Alto case, and Schreiber does not contend otherwise.

Furthermore, there was ample evidence that Schreiber intended to enter the Palo Alto residence to commit a theft, since he had broken down the front door, broken a pane of glass on a rear door and rifled through a sealed package that had been left on the front porch. On this record, Schreiber cannot establish deficient performance by his counsel, let alone prejudice.

Finally, there is no merit to Schreiber's claims that his defense counsel did not adequately investigate or seek to undermine the prosecution's case. Defense counsel consulted with a DNA expert prior to trial and cross-examined the prosecution's DNA experts. Though Schreiber argues that the DNA evidence could have been discredited by raising the issue of Eastman's involvement with the Sacramento case, the "insufficient number of loci matches in the Illinois DNA sample," and unspecified contamination/chain of custody issues, we fail to see how any of those matters would

have shed doubt on the DNA evidence presented in this case. The DNA collected at the scene matched the DNA collected from Schreiber. Eastman had nothing to do with the preparation of either of those DNA samples, and the Illinois case was not introduced or discussed at the trial. Finally, though possible contamination and chain of custody issues relating to the collection and preservation of evidence are important issues to be explored, Schreiber's counsel specifically cross-examined the prosecution's witnesses on these subjects and no problems were disclosed. Again, there is no showing of deficient performance.

III. DISPOSITION

The judgment is affirmed.

Premo, J.

WE CONCUR:

Rushing, P.J.

Elia, J.